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COVID-19 Business Interruption: The English High Court Decision

September 21, 2020

***The Financial Conduct Authority v Arch Insurance (UK) Limited & Others* [2020] EWHC 2448**

The English High Court handed down its much-anticipated decision on the COVID-19 business interruption claims on September 15, 2020. This briefing focuses on key findings made by the judges on the meaning and effect of policy provisions addressing:

1. Non-physical damage Disease cover.
2. Non-physical damage business interruption as a result of an inability to use your premises due to a public authority order or action following or caused by a Notifiable Disease (Hybrid Clauses).
3. Prevention of Access cover.

Within these provisions, the court made determinations about causation and how words such as "Vicinity", "Event" and "Incident" should be interpreted. In the test case, the Court considered actual wordings which are widely used in the UK market. One of the clear lessons of the judgment is that words do make a material difference and how a provision is expressed will influence how it is likely to be interpreted.

Principles of Interpretation

The fundamental of contract interpretation was to determine what a reasonable person – someone with the background knowledge which would have reasonably been available to the parties in the situation in which they were at the time of the contract -- would have understood the contracting parties to have meant by the language used. This meant disregarding the parties' subjective intentions.

Notifiable Disease Cover

Addressing typical wording used by RSA, Amlin and Argenta, the cover provided indemnity for interruption or interference with the Business during the Indemnity Period following the occurrence of a Notifiable Disease within a radius of 25 miles of the Premises. It was stipulated that COVID-19 was a notifiable disease. The Court determined that the causal connector in this type of clause was composite and required interruption or interference with the business during the indemnity period as a result of a notifiable disease. The English law requirement that. for loss to be recoverable, the loss must be proximately caused by the peril insured against required a causal connection between the notifiable disease and the business interruption or interference, but did not require that the notifiable disease be the proximate cause of the loss.

The judges then addressed whether a national lockdown satisfied the requirement that there be a notifiable disease within a 25 mile radius. The Court held that the 25 mile radius provision did not require it to ignore the national picture. The parties would be taken to have contemplated that a local occurrence of a disease could be part of a wider outbreak and that the authorities

would act nationally to address the problem. The Court described it being a fundamental fallacy to treat the occurrence of COVID-19 inside the radius or vicinity as completely separate from its occurrence in the country as a whole.

The judges also determined that policies which referred to the disease being in the "vicinity" of the insured premises required the Court to consider the nature of the event, which in some cases could permit the country as a whole to be in considered in the "vicinity." As an example, the judges mentioned that an outbreak of foot and mouth disease in a country depending on the nature of an insured's business could affect all of its business in the country.

Significantly, two of the three QBE wordings provided indemnity for loss resulting from interruption of or interference with the business "in consequence of any of the following events … any occurrence of a notifiable disease within a 25 mile radius of the premises." The use of the word "event" to describe the matters covered, such as notifiable disease, required that it occur at a particular time, in a particular place and in a particular way, consistent with precedent interpreting the word "event." This wording limited the cover to the particular event and the effect could not be aggregated with other events outside the geographical limit. Thus, the policyholders would have to show the business interruption or interference they suffered arose exclusively from the event within the geographical limit of the policy. This effectively negated their business interruption cover for the pandemic.

Hybrid Clauses

The Court also considered policy forms from Hiscox and RSA which typically granted cover for financial loss resulting solely and directly from an interruption to your activities caused by your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance caused by an occurrence of any human infectious or contagious disease, an outbreak of which must be notified to the local authority. The Court ruled that the use of the word "restriction" denoted a mandatory order not to use the premises or a substantial part of it and did not cover advisory warnings however strongly they were expressed. Furthermore, "interruption and "interference" were different terms, the former denoting an absolute cessation of the original business of the insured at the premises. If the cessation was not absolute, for example, a restaurant with a pre-existing take out service continuing to offer that service but having to close its in-house dining, it would not meet the terms of the clause.

Prevention of Access

The Court considered various policy wordings addressing prevention of access. The Arch wording required that the prevention of access to the premises was due to the actions or advice of a government or local authority because of an emergency which was likely to endanger life or property. It was accepted that COVID was an emergency. The Court held that what had to result from the government action was the closure of the premises for carrying on the business described in the policy schedule. If the insured could carry on a different business at the premises during the shutdown, this would not negate the cover provided in this section.

The Ecclesiastical Insurance policy wording was held to have a valid exclusion for Notifiable Disease. The reference to "competent local authority" was not limited to orders of a local authority, but, instead, was deemed broad enough to cover the UK government which issued the closure order.

Various Hiscox and Amlin policies were considered. Those which expressed the cover to be in respect of an "event", like the QBE policies mentioned earlier, required the business interruption or interference to result from the occurrence of the disease within the geographical limits of the policy and not as a result of the national lockdown. The Court also held that where the wording referred to the incident occurring within the vicinity of the insured premises, this denoted geographical proximity and would not extend to the whole country.

There was one Amlin wording that referred to the business interruption or interference being caused by the action of the local or governmental authority. The Court held that such wording would cover government advice or guidance recommending the closure of the premises for their stated business use.

To highlight the importance that wording differences make, the Court considered two RSA wordings. One granted non-damage business interruption cover where actions or advice of a governmental agency in the vicinity of the insured locations prevented access. This was held to apply to COVID-19 even though the restrictions were nationwide. The other wording required that the actions or advice of a governmental agency be due to emergency likely to endanger life being in the vicinity of the premises which hinders or prevents access to them. The latter wording was held to create a localised form of cover so that the insured would need to show that the government action was as a result of the emergency in the vicinity rather than the country as a whole. This it was accepted would be unlikely.

The Zurich policy wordings were similar in effect to the second RSA wording.

There are many other aspects of the Court's ruling, but these are the key holdings as to the nature of the coverage provided by the policy provisions chosen as to notifiable disease cover, hybrid clauses and prevention of access coverage.

What happens next?

With a judgment as important as this one, it is bound to be the case that both sides are considering an appeal. So this is not the end of the story and in the interim, insurers will be scrutinising policy forms to adopt the drafting hints given by the court. The brokers will, no doubt, be doing the same.

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